

§ 38.702

that its enforcement resources and staff are at appropriate levels. The enforcement staff may not include either members of the designated contract market or persons whose interests conflict with their enforcement duties. A member of the enforcement staff may not operate under the direction or control of any person or persons with trading privileges at the contract market. A designated contract market's enforcement staff may operate as part of the designated contract market's compliance department.

§ 38.702 Disciplinary panels.

A designated contract market must establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this subpart. Disciplinary panels must meet the composition requirements of part 40 of this chapter, and must not include any members of the designated contract market's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

§ 38.703 Notice of charges.

If compliance staff authorized by a designated contract market or a designated contract market disciplinary panel determines that a reasonable basis exists for finding a violation and that adjudication is warranted, it must direct that the person or entity alleged to have committed the violation be served with a notice of charges and must proceed in accordance with the rules of this section. A notice of charges must adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated (or about to be violated); and prescribe the period within which a hearing on the charges may be requested. The notice must also advise that the charged respondent is entitled, upon request, to a hearing on the charges.

§ 38.704 Right to representation.

Upon being served with a notice of charges, a respondent must have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except any mem-

17 CFR Ch. I (4-1-16 Edition)

ber of the designated contract market's board of directors or disciplinary panel, any employee of the designated contract market, or any person substantially related to the underlying investigations, such as material witness or respondent.

§ 38.705 Answer to charges.

A respondent must be given a reasonable period of time to file an answer to a notice of charges. The rules of a designated contract market governing the requirements and timeliness of a respondent's answer to charges must be fair, equitable, and publicly available.

§ 38.706 Denial of charges and right to hearing.

In every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent must be given an opportunity for a hearing in accordance with the requirements of § 38.707 of this part.

§ 38.707 Hearings.

(a) A designated contract market must adopt rules that provide for the following minimum requirements for any hearing conducted pursuant to a notice of charges:

(1) The hearing must be fair, must be conducted before members of the disciplinary panel, and must be promptly convened after reasonable notice to the respondent. The formal rules of evidence need not apply; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing. No member of the disciplinary panel for the matter may have a financial, personal, or other direct interest in the matter under consideration.

(2) In advance of the hearing, the respondent must be entitled to examine all books, documents, or other evidence in the possession or under the control of the designated contract market. The designated contract market may withhold documents that are privileged or constitute attorney work product, documents that were prepared by an employee of the designated contract market but will not be offered in evidence in the disciplinary proceedings, documents that may disclose a technique or

guideline used in examinations, investigations, or enforcements proceedings, and documents that disclose the identity of a confidential source.

(3) The designated contract market's enforcement and compliance staffs must be parties to the hearing, and the enforcement staff must present their case on those charges and sanctions that are the subject of the hearing.

(4) The respondent must be entitled to appear personally at the hearing, must be entitled to cross-examine any persons appearing as witnesses at the hearing, and must be entitled to call witnesses and to present such evidence as may be relevant to the charges.

(5) The designated contract market must require persons within its jurisdiction who are called as witnesses to participate in the hearing and to produce evidence. It must make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant.

(6) If the respondent has requested a hearing, a copy of the hearing must be made and must become a part of the record of the proceeding. The record must be one that is capable of being accurately transcribed; however, it need not be transcribed unless the transcript is requested by Commission staff or the respondent, the decision is appealed pursuant to the rules of the designated contract market, or is reviewed by the Commission pursuant to section 8c of the Act or part 9 of this chapter. In all other instances a summary record of a hearing is permitted.

(b) [Reserved]

§ 38.708 Decisions.

Promptly following a hearing conducted in accordance with § 38.707 of this part, the disciplinary panel must render a written decision based upon the weight of the evidence contained in the record of the proceeding and must provide a copy to the respondent. The decision must include:

(a) The notice of charges or a summary of the charges;

(b) The answer, if any, or a summary of the answer;

(c) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(d) A statement of findings and conclusions with respect to each charge, and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(e) An indication of each specific rule that the respondent was found to have violated; and

(f) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

§ 38.709 Final decisions.

Each designated contract market must establish rules setting forth when a decision rendered pursuant to this section will become the final decision of such designated contract market.

§ 38.710 Disciplinary sanctions.

All disciplinary sanctions imposed by a designated contract market or its disciplinary panels must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, must take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction must also include full customer restitution, except where the amount of restitution, or to whom it should be provided, cannot be reasonably determined.

§ 38.711 Warning letters.

Where a rule violation is found to have occurred, no more than one warning letter may be issued per rolling 12-month period for the same violation.

§ 38.712 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.700 of this part.

Subpart O—Dispute Resolution

SOURCE: 77 FR 36700, June 19, 2012, unless otherwise noted.